TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 276.

THE UNITED STATES, APPELLANT,

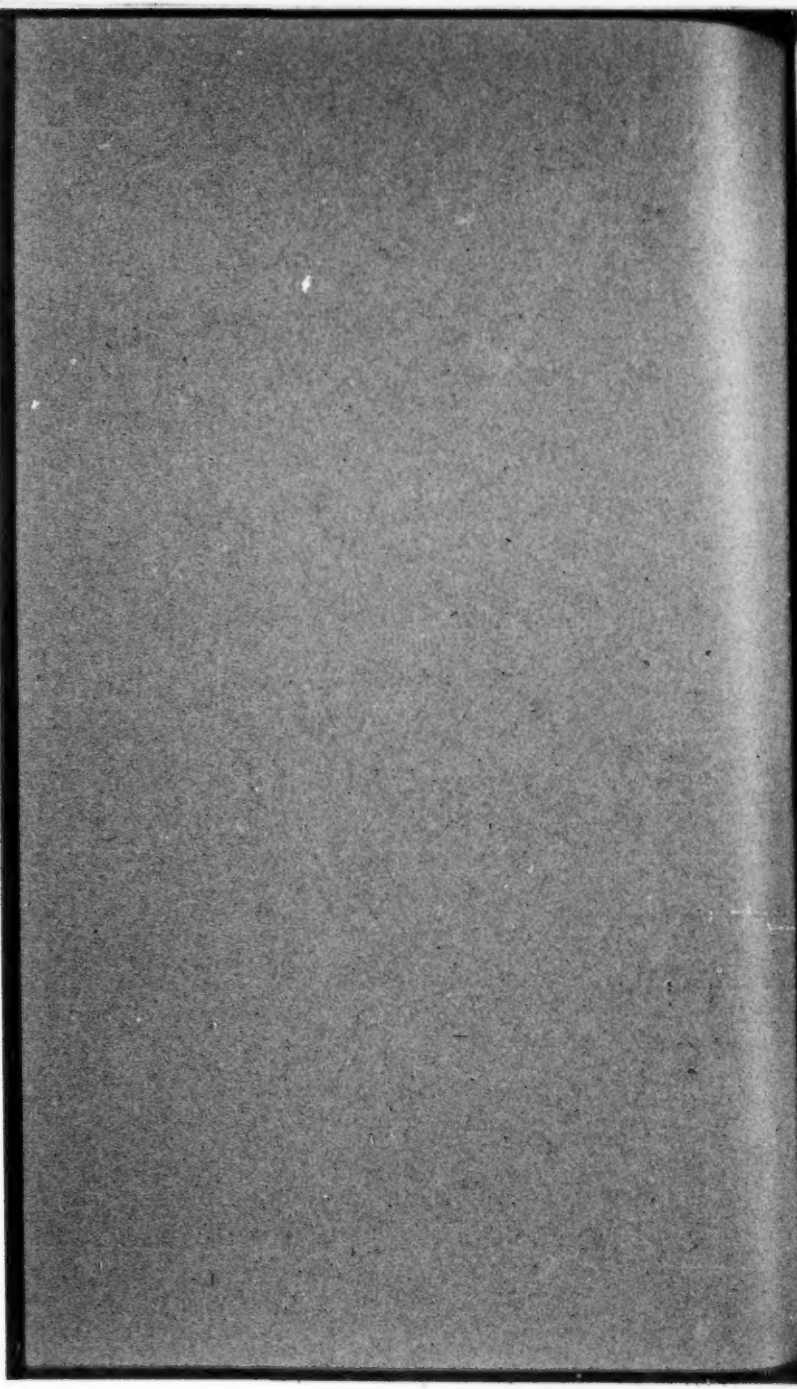
vs.

JOHN M. HITE.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 28, 1906.

(20231.)



UPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 276.

THE UNITED STATES, APPELLANT,

vs.

JOHN M. HITE.

APPEAL FROM THE COURT OF CLAIMS.

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In the Court of Claims.

JOHN M. HITE
vs.
UNITED STATES. } No. 22517.

I. *Petition—Filed March 23, 1901.*

e petition of John M. Hite respectfully represents:

That he is a citizen of the United States and a resident of the city ltimore, State of Maryland; that he has at all times borne true ance to the Government of the United States, and that he has never y way voluntarily aided, abetted, or given encouragement to rebel- gainst said Government.

That by act approved March 3, 1899 (30 Stat. L., 1228), Congress ded, among other things, that—

he officers and enlisted men comprising the temporary force of the during the war with Spain who served creditably beyond the limits e United States, and who have been or may hereafter be discharged, be paid two months' extra pay; and all such officers and enlisted of the Navy who have so served within the limits of the United s, and who have been or may hereafter be discharged, shall be paid nonth's extra pay."

That on the 14th day of May, 1898, he was appointed and com- oned an assistant engineer in the temporary force of the Navy of Inited States for the war with Spain, under the provisions of an act of ress approved May 4, 1898, and served creditably as such officer on the United States battleship "Massachusetts," beyond the limits of the United States, to wit, in Cuban waters, from the 1st day of June until the 17th day of December, 1898, on which latter date s detached from said ship and ordered home, and on the 22d day ecember, 1898, he was honorably discharged from the naval service.

That on the 18th day of April, 1899, he received from the Govern- the sum of $166.66 as two months' extra pay under said provision arch 3, 1899, which allowance was based on the leave pay of an ant engineer, the accounting officers of the Treasury having con- l said provisions of said act of March 3 as authorizing only extra s of the grade occupied by the beneficiary at the time of his dis- e; and that he has never received any further amount on said nt.

That the sea-service pay of an assistant engineer in the Navy was, s, $1,700 per annum, and petitioner is advised and believes that said nting officers construed said provision of said act of March 3 erro- ly, and should have construed it as authorizing and directing the ent to him of two months' extra-service pay as of the kind of e performed by him during the war with Spain, to wit, sea-service nd that he should have been paid the sum of $283.32 instead of 66, and that the Government is still indebted to him on this account ifference between said sums, or $116.66.

That he is the sole owner of said claim and no assignment or trans- as been made thereof, or of any part thereof, or any interest therein; he is justly entitled to the amount of $116.66 from the defendant

after allowing all just credits and set-offs; and he demands judgment against the defendant for said sum.

JOHN M. HITE.

EDWARD S. MCCALMONT,
Attorney for Claimant.

I, John M. Hite, do solemnly swear that I have read the fore-
3 going petition by me subscribed and know the contents thereof, and that the facts stated therein on my own knowledge are true and those stated on information and belief I believe to be true.

JOHN M. HITE.

Subscribed and sworn to before me this 22d day of March, 1901.

HARRY S. WELCH,
Notary Public, D. C.

4 II. *Traverse—Filed as of Dec. 6, 1905.*

In the Court of Claims of the United States, December term, A. D. 1905–6.

JOHN M. HITE
vs.
THE UNITED STATES. } No. 22517.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

J. A. VAN ORSDEL,
Assistant Attorney-General.

5 III. *Argument and submission.*

This cause was argued by Mr. E. S. McCalmont for the claimant, and Mr. John Q. Thompson for the defendants, on the 6th day December, 1905, and submitted.

6 IV. *Findings of fact and conclusion of law—Also the opinion of the court and dissenting opinion—Filed March 12, 1906.*

JOHN M. HITE
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant, John M. Hite, was appointed assistant engineer in the United States Navy, with the relative rank of ensign, for temporary

service during the late war with Spain, on May 14, 1898; he reported for duty on board the U. S. S. "Massachusetts," in obedience to orders of the Navy Department, on June 1, 1898, and served creditably as such officer on said ship until December 17, 1898, at which date he was detached and ordered to his home, and on December 22, 1898, was honorably discharged from the naval service.

The order referred to is in the words following:

"NAVY DEPARTMENT,
"*Washington, D. C., Dec. 12, 1898.*

"SIR: You are hereby detached from duty on board the U. S. S. "Massachusetts," and will proceed to your home.

"Immediately upon your arrival report your local address in full to the Bureau of Navigation, Navy Department, Washington, D. C. See article 224, U. S. Navy Regulations, 1896.

"Report also the date of your detachment, and inform the Department of the status of your accounts, and whether you are indebted to the Government by reason of advances drawn by you.

"Respectfully,

"JNO. D. LONG, *Secretary.*

"Assistant Engineer JOHN M. HITE, U. S. N.,
"*U. S. S. Massachusetts.*"

II.

The U. S. S. "Massachusetts" was in commission and cruised beyond the limits of the United States (in Cuban waters) during the time of the claimant's service on board.

III.

In settlement of claimant's claim for extra pay authorized by the act of March 3, 1899, he was allowed by the accounting officers of the Treasury Department two months' pay at the rate of pay of an assistant engineer in the Navy on waiting orders only, to wit, $166.66.

If entitled to two months' pay upon the basis of sea service the difference is $116.66.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to judgment in the sum of one hundred and sixteen dollars and sixty-six cents ($116.66).

PEELLE, Ch. J., delivered the opinion of the court.

On May 14, 1898, the claimant herein was appointed and commissioned an assistant engineer in the temporary force of the Navy, under the provisions of the act of May 4, 1898 (30 Stats. L., 369), in substance authorizing the President in case of exigency to appoint from civil life such officers to serve "only during the continuance of the
7 exigency under which their services are required in the existing war." The claimant was assigned to duty on the U. S. S. "Massachusetts," a vessel in commission, on which vessel he served creditably in

Cuban waters until December 17, 1898, when he was detached therefrom and ordered to his home. Five days thereafter, December 22, he was discharged, his services being no longer required.

The war with Spain, which began April 21, 1898, terminated in fact at the time of, if not before, the signing of the treaty of Paris of December 10, 1898. Thomas case (39 C. Cls. R., 1–5).

The claimant has been paid $166.66, being two months' pay based on leave or waiting orders pay of an officer of his grade. He claims the difference between that sum and $283.32, the latter being two months' pay based on sea service, hence this action.

The act of March 3, 1899 (30 Stats. L., 1228), provides:

"The officers and enlisted men comprising the temporary force of the Navy during the war with Spain who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay."

The defendants' contention is that this case is ruled by the case of United States v. North (112 U. S. R., 510) and the case of Emory v. United States (19 C. Cls. R., 254), in the first of which cases the court, in respect of the pay the claimant was entitled to receive under the act, said:

"The pay they were to receive was evidently that which they were receiving at the end of their engagement or when they were honorably discharged. The language is, 'shall be entitled to receive three months' extra pay,' evidently meaning the same pay they would have received if they had remained in the same service three months longer. It follows that, as North was serving at sea when he was ordered away, he was entitled to three months' sea pay, and as Emory was mustered out of the service in the war as lieutenant-colonel of volunteers, his pay must be in accordance with that rank."

It will also be noticed in that case that the court said "their engagement to serve in the war with Mexico ended when they were taken away from that service by proper authority." And further, "That as North was serving at sea when he was ordered away, he was entitled to three months' sea pay." In the present case the claimant was ordered away from the service when he was detached from his vessel, as he was appointed to serve "only during the continuance of the exigency under which their services are required in the existing war," and the war was over.

In the Emory case it was held that the act of February 19, 1879 (20 Stat. L., 316), extended the provisions of the act of July 19, 1848 (9 Stat. L., 248), to the officers, soldiers, and seamen of the Army and Navy who served in the war with Mexico, and that three months' extra pay provided for by those acts was pay proper and not pay and allowances. It was further held in that case that the kind of pay an officer was receiving when his service ended furnished the standard by which the extra pay was given.

8 In the Terrell case (40 C. Cls. R., 78) the question was whether the claimant could recover the extra pay of the rank which he held at the time of muster out, and the ruling was that the acts

of January 12, 1899, and May 26, 1900, extended only to the pay which an officer or soldier would have received if his regiment had not been furloughed.

In response to the defendants' contention and to the authorities they cite, the claimant contends that inasmuch as he was commissioned in the temporary force of the Navy his engagement ended when he was detached from his vessel and ordered home. He was detached from his vessel seven days after the signing of the treaty of Paris. His engagement having ended and he having been discharged, the two months' extra pay should have been given him upon the basis of the pay he was receiving when detached.

The claimant was in the temporary service of the Navy pursuant to a statute for that purpose. The facts in this case are exceptional, and upon those facts the case must rest. To hold, because the claimant was ordered to his home where he was discharged five days later instead of being discharged on the day he was detached, that therefore he is entitled only to the lesser pay would be a construction too narrow to harmonize with the purpose of Congress as disclosed by the act.

The act clearly gives to officers "comprising the temporary force of the Navy during the war with Spain, who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged," two months' extra pay. The two months' extra pay is given because of creditable service beyond the limits of the United States during the war with Spain, and therefore upon discharge such officers become entitled to the same pay they were receiving while so serving beyond the limits of the United States, and this is in effect the ruling in the Terrell case (supra).

In other words, the basis of the two months' extra pay is for service at sea beyond the limits of the United States during the war with Spain, and to hold that when such service has been rendered the extra pay shall be upon a different basis would defeat the purpose of the statute, and thus believing, we must hold that the claimant is entitled to recover the difference between what he was paid and the sea pay of his grade, amounting to one hundred and sixteen dollars and sixty-six cents ($116.66), for which judgment is ordered to be entered.

ATKINSON, J., dissenting.

I regret that I can not concur in the opinion of the court in this case, for the reason that it appears inequitable not to do so; but it seems to me that it so clearly comes within the decisions of this court and the Supreme Court of the United States, in cases where the same principle is involved, that I feel it to be my duty to dissent.

The act of March 3, 1899 (30 Stat. L., 1228), under which this suit is instituted, reads as follows:

"The officers and enlisted men comprising the temporary force of the Navy during the war with Spain, who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay."

9 This suit, therefore, was brought by reason of the rejection of the claimant's claim for two months' sea-service pay by the accounting officers of the Treasury, and allowing him only waiting-orders pay. The rejection was based upon a ruling of the Auditor of the Navy Department made March 8, 1899, construing said act as modified by a decision of the Assistant Comptroller of the Treasury made March 11, 1899 (5 Comp. Dec., 559).

The Assistant Comptroller held that the rate of pay contemplated by the Congress was according to the kind of service the officer or enlisted man was engaged in performing at the time of his discharge. His conclusion was based upon the decision of the Supreme Court of the United States in the cases of the United States v. North and Emory (112 U. S. R., 510).

No question is raised before us as to the right or duty of the Government to pay claimant the two months' extra pay provided for by the statute above quoted; but the question referred to the court, and upon which a decision is asked, is whether claimant should be paid "sea-service" pay, which is at the rate of $1,700 per annum, or "shore" or "waiting-orders" pay, which is only at the rate of $1,000 per annum allowed to officers of the rank of the claimant in this case, while he is not engaged "at sea" or in "sea service."

Claimant's counsel contends that the decision of the Supreme Court in the North and Emory cases, supra, is that the court did not have before it any question as to the rate of pay intended by the acts giving extra pay to those officers who had served in the Mexican war in the military and naval service of the United States, and that therefore there is a material difference between that case and the case at bar. I have carefully examined the facts in that case, because it seemed to me harsh and apparently unjust to the claimant in the case before us that he should be detached from his ship when he was drawing pay at the rate of $1,700 per annum and ordered to his home to be discharged from the public service. Five days thereafter he was honorably discharged, and after his discharge he was paid at the rate of $1,000 per year, which was the pay allowed under the statute while he was "waiting orders." Equity seems to demand that he should have been paid at the rate of $1,700 per annum, because his entire enlistment and service was on "sea duty;" but the statute before us, which is somewhat ambiguous, does not define in plain terms whether an officer discharged under such circumstances shall be paid on the basis of "sea pay," "shore pay," or "waiting-orders pay;" yet the decision in the North and Emory cases, supra, is in no respect ambiguous, as I read it, and it is therefore our duty to be guided by it.

In the cases of Emory and North v. The United States (19 C. Cls. R., 270) the court said:

* * * * * * *

"The court has no power to legislate as to what grade of pay naval officers shall now receive. It can not decree that an officer waiting orders shall recover sea-service pay or that an officer on sea service shall recover waiting-orders pay. But inasmuch as Congress went to the act of 1848 when enacting that naval officers shall receive three months' extra pay, the court may go there for a like purpose and carry

out the analogy which the act of 1879 instituted. We therefore hold that the pay which a naval officer was receiving when his service in the war with Mexico ended furnishes the standard by which his three months' extra pay must be computed. If he was then on sea service, it will be sea-service pay; if he was on other duty, it will be other-duty pay; if he was on waiting orders, it will be waiting-orders pay; if he was a lieutenant commanding, it will be a lieutenant's pay when commanding; if he was a lieutenant on other duty, it will be simply a lieutenant's pay. As to the point of time in the period of an army or navy officer's service which shall be taken as equivalent to the muster out of the volunteers—the time at which his rank must be ascertained and extra pay must be computed—we are of the opinion that it should be the time when his 'actual service during the war' ceased. In the case of volunteer officers that time was definitely by the event of their muster out. They served in the war with Mexico not till the signing of the treaty, not till the exchange of ratifications, not till the passage of the act giving them three months' extra pay, but until they had 'served out the term of their engagements,' as evidenced by their muster out."

These cases were appealed to the Supreme Court of the United States, and the decision of this court was affirmed as stated above. The Supreme Court not only had before it in review the various acts of Congress bearing upon the point in issue, but it also had before it the opinion of the Court of Claims as well, which is exhaustive and convincing, and which explicitly holds, in language which can not be mistaken or misconstrued, that the time from which the extra pay must be reckoned is not from the date of the signing of the treaty of peace, but it must be when the soldier's actual service ceased, which time is definitely fixed by the date that he was mustered out of the Army or the Navy.

It is plainly evident to my mind that Chief Justice Waite, in passing upon these same cases on appeal, sustained the views expressed by the Court of Claims, when the language following was used by him:

"The pay they were to receive was evidently that which they were receiving at the end of their engagement, or when they were honorably discharged. The language is, 'shall be entitled to receive three months' extra pay,' evidently meaning the same pay they would have received if they had remained in the same service three months longer. It follows that, as North was serving at sea when he was ordered away, he was entitled to three months' sea pay, and as Emory was mustered out of the service in the war as lieutenant-colonel of volunteers his pay must be in accordance with that rank."

What are we to infer was the intent of the Supreme Court in the language above quoted when read in connection with the decision of the Court of Claims, which it was then reviewing? Did it intend to hold that the officer's pay was to be computed from the time of the signing of the treaty of peace? It does not say so. But it does say that it was "at the end of their engagement," which in the case of both Emory and North was at the time "when they were honorably discharged."

The claimant in the case at bar, however, is not in every respect on all fours with the cases of Emory and North. The claimant Hite in the case before us was not detached from his ship until after the treaty of

peace was signed with Spain, and five days subsequent to the receipt of such order he was honorably discharged from the service of the United States Navy. It is clearly evident that the court meant to
11 convey the idea, the same as it was expressed by the Court of Claims, that the engagement of the officers could not be completed until they were regularly mustered out of the service.

If this were a matter of first impression, the exceptional circumstances which the court thinks should bring this case within the spirit of the statute might prevail. But neither this court nor the Supreme Court has construed the statute to mean anything more than its language implies.

The Supreme Court in the Emory and North cases, supra, in construing the act of 1848, held that the rate of pay an officer should receive must be the pay pertaining to the character of duty he was performing at the time of his discharge. Applying this construction to the act of March 3, 1899, which is in fact a practical reproduction of the act of 1848, we should hold in the case at bar, although, in a sense, it bears the mark of harshness, that the petition of the claimant should be dismissed.

I am authorized to state that Howry, J., concurs in this dissent.

12 V. *Judgment of the court.*

JOHN M. HITE
v.
THE UNITED STATES. } No. 22517.

At a Court of Claims held in the city of Washington on the 12th day of March, 1906, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the claimant, John M. Hite, do have and recover of and from the United States the sum of one hundred and sixty-six dollars and sixty-six cents ($166.66).

BY THE COURT.

13 VI. *Application for, and allowance of, appeal.*

JOHN M. HITE
vs.
THE UNITED STATES. } 22517.

From the judgment rendered in the above-entitled cause on the 12th day of March, 1906, in favor of claimant, the defendants, by their Attorney-General, on the 17th day of April, 1906, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. A. VAN ORSDEL,
Assistant Attorney-General.

Filed April 17, 1906.

Ordered: That the application for appeal in the above-entitled cause be allowed as prayed for.

BY THE COURT.

April 17, 1906.

14 Court of Claims.

JOHN M. HITE
v.
THE UNITED STATES. } No. 22517.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the court; of the opinion of the court and of the dissenting opinion; of the judgment of the court; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 27 day of April, 1906.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

15 (Indorsement on cover:) File No. 20231, Court of Claims. Term No. 276. The United States, appellant, vs. John M. Hite. Filed April 28th, 1906. File No. 20231.

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No. 276.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

J. A. VAN ORSDEL,
Assistant Attorney-General.

JOHN Q. THOMPSON,
Special Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
JOHN M. HITE.
No. 276.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On May 14, 1898, the claimant was appointed assistant engineer in the United States Navy, with the relative rank of ensign, for temporary service during the war with Spain. On June 1, 1898, he reported for duty on the U. S. S. *Massachusetts*, in obedience to orders issued by the Navy Department, and served creditably as such officer on said vessel until December 17, 1898, at which time he was detached and ordered to his home. On December 22, 1898, he was honorably discharged from the naval service.

The U. S. S. *Massachusetts* was in commission and cruised beyond the limits of the United States (in

Cuban waters) during the time the claimant served on board said vessel. In settlement of claimant's claim for extra pay authorized by the act of March 3, 1899, he was allowed by the accounting officers of the Treasury two months' pay at the rate of pay of an assistant engineer in the Navy "on waiting orders."

While doing sea service beyond the limits of the United States, claimant was entitled to and received pay at the rate of $1,700 per annum. While he was on leave or waiting orders he was entitled to pay at the rate of $1,000 per annum, which is the leave or waiting pay of an officer of his rank. He was on leave or waiting-orders pay from December 17 until December 22, 1898, a period of five days.

The act of March 3, 1899 (30 Stat. L., p. 1228), among other things, provides as follows:

> The officers and enlisted men comprising the temporary force of the Navy during the war with Spain who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay.

The claimant was paid $166.66 as two month's extra pay under the foregoing statute, which payment was based on the leave pay of an assistant engineer, to wit, at the rate of $1,000 per annum. He contends that he should have received two months' extra pay at the rate of $1,700 per annum,

which is the pay for sea service of an assistant engineer in the Navy, and therefore he should have received, as two months' extra pay, the sum of $283.32 instead of $166.66. He here claims $116.66 in addition to the $166.66 heretofore received.

The cause was heard by the court below on the 6th of December, 1905, and on March 12, 1906, the court made findings of fact, conclusion of law, and rendered judgment in favor of the claimant in said sum of $166.66. From the judgment so entered the United States appeals to this court.

THE ISSUE.

The claimant contends that the two months' extra pay provided for in the foregoing statute should be at the rate of pay he received while *doing sea service*, to wit, $1,700 per year.

The contention of the Government is that under the ruling of this court in the cases of North and Emory (112 U. S. R., p. 510) the claimant has been paid all that was due him, inasmuch as he was paid two months' extra pay provided for in the statute at the rate of pay he was receiving *at the time of his discharge*, to wit, at the rate of $1,000 per annum.

ARGUMENT.

During the interval of time between December 17, when claimant was detached from the battle ship *Massachusetts*, and December 22, when he was discharged from the service, a period of five days, he was not performing sea service, but was on leave or waiting-orders pay, and therefore was entitled to

compensation during such time at the rate of $1,000 a year.

The language of the statute is "shall be paid two months' extra pay," evidently meaning the same pay he would have received if he had remained in the same service two months longer, and if the claimant had remained in the same service two months longer he would have received and been paid compensation at the rate of $1,000 per year, which was leave or waiting-orders pay. And this is the construction given to a like statute in the case of *United States* v. *North* and *United States* v. *Emory* (112 U. S. R., p. 510). Quoting from the opinion, Chief Justice Waite said:

> The pay they were to receive was evidently that which they were receiving at the end of their engagement, or when they were honorably discharged. The language is "shall be entitled to receive three months' extra pay," evidently meaning the same pay they would have received if they had remained in the same service three months longer.
>
> (See report cited, p. 513.)

It is true that the claimant was in the kind of service for which smaller rate of pay is granted the short period of five days. But this fact does not interfere with the principle. Had he continued in service "on leave or waiting-orders pay" from the time he was detached from the *Massachusetts* for a period of several months he would have been entitled to compensation at the rate of $1,000 per year, and at the end of a year or any other period

of such service, if discharged, he would have as much right or reason to contend for the two months' extra pay based on his *former sea pay* as he has for the present contention.

Two of the judges of the court below did not concur in the prevailing opinion in this case. Judge Atkinson wrote the dissenting opinion, in which Judge Howry concurred. It presents a clear and comprehensive statement, together with an able discussion of the issue involved. For the sake of convenience we here insert the dissenting opinion:

> ATKINSON, J., dissenting.
>
> I regret that I can not concur in the opinion of the court in this case, for the reason that it appears inequitable not to do so; but it seems to me that it so clearly comes within the decisions of this court and the Supreme Court of the United States, in cases where the same principle is involved, that I feel it to be my duty to dissent.
>
> The act of March 3, 1899 (30 Stat. L., 1228), under which this suit is instituted, reads as follows:
>
> "The officers and enlisted men comprising the temporary force of the Navy during the war with Spain, who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay."

This suit, therefore, was brought by reason of the rejection of the claimant's claim for two months' sea-service pay by the accounting officers of the Treasury and allowing him only waiting-orders pay. The rejection was based upon a ruling of the Auditor for the Navy Department made March 8, 1899, construing said act as modified by a decision of the Assistant Comptroller of the Treasury made March 11, 1899 (5 Comp. Dec., 559).

The Assistant Comptroller held that the *rate* of pay contemplated by the Congress was according to the kind of service the officer or enlisted man was engaged in performing *at the time of his discharge.* His conclusion was based upon the decision of the Supreme Court of the United States in the cases of the *United States* v. *North* and *Emory* (112 U. S. R., 510).

No question is raised before us as to the right or duty of the Government to pay claimant the two months' extra pay provided for by the statute above quoted; but the question referred to the court, and upon which a decision is asked, is whether claimant should be paid "sea-service" pay, which is at the rate of $1,700 per annum, or "shore" or "waiting-orders" pay, which is only at the rate of $1,000 per annum allowed to officers of the rank of the claimant in this case, while he is not engaged "at sea" or in "sea service."

Claimant's counsel contends that the decision of the Supreme Court in the North and Emory cases, *supra,* is that the court did not have before it any question as to the rate of pay intended by the acts giving extra pay to

those officers who had served in the Mexican war in the military and naval service of the United States, and that therefore there is a material difference between that case and the case at bar. I have carefully examined the facts in that case, because it seemed to me harsh and apparently unjust to the claimant in the case before us that he should be detached from his ship when he was drawing pay at the rate of $1,700 per annum and ordered to his home to be discharged from the public service. Five days thereafter he was honorably discharged, and after his discharge he was paid at the rate of $1,000 per year, which was the pay allowed under the statute while he was "waiting orders." Equity seems to demand that he should have been paid at the rate of $1,700 per annum, because his entire enlistment and service was on "sea duty;" but the statute before us, which is somewhat ambiguous, does not define in plain terms whether an officer discharged under such circumstances shall be paid on the basis of "sea pay," "shore pay," or "waiting-orders pay;" yet the decision in the North and Emory cases, *supra*, is in no respect ambiguous, as I read it, and it is, therefore, our duty to be guided by it.

In the cases of *Emory and North* v. *The United States* (19 C. Cls. R., 270) the court said:

* * * * *

"The court has no power to legislate as to what grade of pay naval officers shall now receive. It can not decree that an officer wait-

ing orders shall recover sea-service pay or that an officer on sea service shall recover waiting-orders pay. But inasmuch as Congress went to the act of 1848 when enacting that naval officers shall receive three months' extra pay, the court may go there for a like purpose and carry out the analogy which the act of 1879 instituted. We therefore hold that the pay which a naval officer was receiving when his service in the war with Mexico ended furnishes the standard by which his three months' extra pay must be computed. If he was then on sea service, it will be sea-service pay; if he was on other duty, it will be other-duty pay; if he was on waiting orders, it will be waiting-orders pay; if he was a lieutenant commanding, it will be a lieutenant's pay when commanding; if he was a lieutenant on other duty, it will be simply a lieutenant's pay. As to the point of time in the period of an army or navy officer's service which shall be taken as equivalent to the muster out of the volunteers—the time at which his rank must be ascertained and extra pay must be computed—we are of the opinion that it should be the time when his '*actual service during the war*' ceased. In the case of volunteer officers that time was definitely fixed by the event of their muster out. They served in the war with Mexico not till the signing of the treaty, not till the exchange of ratifications, not till the passage of the act giving them three months' extra pay, but until they had 'served out the term of their engagements,' as evidenced by their muster out."

These cases were appealed to the Supreme Court of the United States, and the decision of this court was affirmed as stated above. The Supreme Court not only had before it in review the various acts of Congress bearing upon the point in issue but it also had before it the opinion of the Court of Claims as well, which is exhaustive and convincing, and which explicitly holds, in language which can not be mistaken or misconstrued, that the time from which the extra pay must be reckoned is not from the date of the signing of the treaty of peace, but it must be when the soldier's actual service ceased, which time is definitely fixed by the date that he was mustered out of the Army or the Navy.

It is plainly evident to my mind that Chief Justice Waite, in passing upon these same cases on appeal, sustained the views expressed by the Court of Claims when the language following was used by him:

"The pay they were to receive was evidently that which they were receiving at the end of their engagement, or when they were honorably discharged. The language is, 'shall be entitled to receive three months' extra pay,' evidently meaning the same pay they would have received if they had remained in the same service three months longer. It follows that as North was serving at sea when he was ordered away, he was entitled to three months' sea pay, and as Emory was mustered out of the service in the war as lieutenant-colonel of volunteers his pay must be in accordance with that rank."

What are we to infer was the intent of the Supreme Court in the language above quoted when read in connection with the decision of the Court of Claims, which it was then reviewing? Did it intend to hold that the officer's pay was to be computed from the time of the signing of the treaty of peace? It does not say so. But it does say that it was "at the end of their engagement," which in the case of both Emory and North was at the time "*when they were honorably discharged.*"

The claimant in the case at bar, however, is not in every respect on all fours with the cases of Emory and North. The claimant Hite in the case before us was not detached from his ship until after the treaty of peace was signed with Spain, and five days subsequent to the receipt of such order he was honorably discharged from the service of the United States Navy. It is clearly evident that the court meant to convey the idea, the same as it was expressed by the Court of Claims, that the engagement of the officers could not be completed until they were regularly mustered out of the service.

If this were a matter of first impression, the exceptional circumstances which the court thinks should bring this case within the *spirit of the statute* might prevail. But neither this court nor the Supreme Court has construed the statute to mean anything more than its language implies.

The Supreme Court in the Emory and North cases, *supra*, in construing the act of 1848, held that the rate of pay an officer should receive

must be the pay pertaining to the character of duty he was performing at the time of his discharge. Applying this construction to the act of March 3, 1899, which is in fact a practical reproduction of the act of 1848, we should hold in the case at bar, although in a sense it bears the mark of harshness, that the petition of the claimant should be dismissed.

I am authorized to state that Howry, J., concurs in this dissent.

THE EQUITIES.

It is probably unnecessary to present further argument than is contained in the foregoing able opinion, but in view of the suggestions that the equities are with the claimant we desire to remind the court that the Government has equities which seem to appeal with great force to the mind of the interpreter of the statute.

The claimant was appointed and commissioned as an assistant engineer in the temporary force of the Navy May 14, 1898. (Rec., p. 1.) At the time of his appointment he knew just what his compensation would be as then provided by law. It was his privilege to refuse the appointment if not satisfied with the pay provided for his services. He had no right to expect and did not contemplate that the Congress would subsequently make provisions for a gratuity to be presented him at the end of his service.

The statute granting him two months' extra pay was approved March 3, 1899, about two months and a half after he was discharged from the service and

nearly ten months after claimant's appointment. The provision for extra pay was therefore a gratuity granted by Congress and for which the Government was in no way liable under its contract with the claimant. It therefore does not seem equitable that he should receive the gratuity of two months' extra pay based upon his sea pay while rendering service beyond the limits of the United States.

This is what is commonly termed a "class case," and it is one of the most favorable of the class for the claimants. There are a large number of claims which will be affected by the decision of the court in the case at bar, and that decision will serve as a standard whereby the Court of Claims and the accounting officers of the Navy Department may measure the compensation due other officers making similar demands to that of claimant.

In view of the foregoing we ask that the judgment rendered by the Court of Claims be reversed.

J. A. VAN ORSDEL,
Assistant Attorney-General.

JOHN Q. THOMPSON,
Special Attorney.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 276.

THE UNITED STATES, APPELLANT,

v.

JOHN M. HITE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR JOHN M. HITE.

EDWARD S. MCCALMONT, *Attorney.*

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24342

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Statement.

The facts and issue are correctly stated in the brief filed by the Assistant Attorney-General.

ARGUMENT.

It must be kept in mind that war with Spain began April 21, 1898, and that the appellee was appointed an officer in the Navy by authority of the act of Congress passed May 4, 1898, his appointment having been made May 14, 1898. The act of May 4, 1898, so far as pertinent, provides as follows:

> "Whenever within the next twelve months, an exigency may exist which, in the judgment of the

> President, renders their services necessary, he is hereby authorized to appoint from civil life and commission such officers of the line and staff, not above the rank or relative rank of commander, and warrant officers, including warrant machinists, and such officers of the Marine Corps not above the rank of captain, to be appointed from the non-commissioned officers of the corps and from civil life, as may be requisite:
>
> "*Provided,* That such officers shall serve only during the continuance of the exigency under which their services are required in existing war."

The war with Spain terminated at the time of the signing of the Treaty of Paris, December 10, 1898, if not before. The appellee served under his appointment until December 17, 1898, at which time he was detached from the vessel on which he had served and ordered home. He was honorably discharged five days thereafter.

Hite was appointed under the act of May 4, 1898, because an exigency existed which rendered his "*services* necessary." Considering the short time that elapsed between the date of his detachment and the date of his discharge, and considering the fact that the war with Spain was at an end at the time of his detachment, it is a fair presumption that the law of May 4, as embodied in its proviso, was being carried out, and that on December 17, so far as the appellee was concerned, the exigency which rendered his *services* necessary ended. But why detach him and send him home without at once discharging him? There can be no other valid reason assigned, under the conditions existing, than that the authorities deemed it reasonable that the United States should pay the expenses of his journey home and for his time in getting there, and this could be done only by discharging him after his arrival home.

It is clearly obvious that the act of May 4, 1898, contemplated the appointment of naval officers from civil life for *active* service, and it just as clearly contemplated that when

the active service of each appointee should no longer be necessary by reason of the exigency produced by the war with Spain, that he should be discharged.

The act under which the question at issue arises was passed March 3, 1899, more than two months after Hite was discharged, and also after many other of the officers appointed under the act of May 4, 1898, were discharged. The act of March 3 provides as follows:

> "The officers and enlisted men comprising the temporary force of the Navy during the war with Spain who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay."

Here again it appears to be plain that Congress was appropriating extra pay for active services. In the case of both the one month's and two months' extra pay it was made necessary that to be a beneficiary the officer must have *served* creditably. He was appointed for the purpose of active service and active service was the basis for extra pay.

In his brief the Assistant Attorney-General says:

> "It is true that the claimant was in the kind of service for which smaller rate of pay is granted the short period of five days. But this fact does not interfere with the principle. Had he continued in service 'on leave or waiting orders pay' from the time he was detached from the *Massachusetts* for a period of several months he would have been entitled to compensation at the rate of $1,000 per year, and at the end of a year or any other period of such service, if discharged, he would have as much right or reason to contend for the two months' extra pay based on his *former sea pay* as he has for the present contention."

The Assistant Attorney-General is supposing a condition that could not have occurred under the law. The Navy Department was obliged under the proviso of the act of May 4, 1898, to discharge the officers appointed thereunder when their services were no longer required in connection with the war with Spain. The fact that the claimant was detached from active service only five days before his discharge tends strongly to show that when detached it was because his services were no longer required, and was preparatory to his discharge on his arrival home. In other words, it seems almost a necessary conclusion that the detaching order was the preliminary step to a severance of the claimant's connection with the Navy, and that it was the expression of the Department that his services were no longer necessary, and that, under the proviso to the act of 1898, it became the Department's duty to discharge him.

In this connection it may not be amiss to call attention to a statement of the Assistant Attorney-General near the end of his brief. He says:

> "This is what is commonly termed as a 'class' case, and it is one of the most favorable of the class for the claimants."

There was no exercise of choice in bringing the suit for the reason suggested. The claimant was the first of the "class" who consulted with counsel, and it was upon the facts of his case that an opinion was given by counsel that the law had been erroneously construed by the accounting officers of the Treasury to his detriment. This reason alone governed in the choice of the case to be presented.

The Assistant Attorney-General probably means by his statement to convey the idea that most other cases of the class show that there was a longer time between detachment and discharge than five days, as in the claimant's case, and that therefore the bulk of cases do not indicate that the detachment was merely preliminary to the discharge and with the

discharge in view. If so, the answer is that in every case which has been examined by claimant's counsel the discharge followed the detachment order as soon as the officer reported his arrival at home, as required to do by the order. If detached at a port of the United States, the time between the detachment and the discharge on arriving home was always shorter than when the detachment was made in the Philippines or in foreign ports. The point is that the rule practiced in detaching and discharging warrants the conclusion that it was based on the intention to discharge when the detachment was made. In this connection attention is called to the wording of the detaching order:

"NAVY DEPARTMENT,
"WASHINGTON, D. C., *Dec.* 12, 1898.

"SIR: You are hereby detached from duty on board the U. S. S. 'Massachusetts,' and will proceed to your home.

"Immediately upon your arrival report your local address in full to the Bureau of Navigation, Navy Department, Washington, D. C. See article 224, U. S. Navy Department, 1896.

"Report also the date of your detachment, and inform the Department of the status of your accounts, and whether you are indebted to the Government by reason of advances drawn by you.

"Respectfully, JNO D. LONG, *Secretary.*

"Assistant Engineer JOHN M. HITE,
"U. S. N., U. S. S. Massachusetts."

It is to be observed that the order simply detaches the claimant and orders him to his home, without a word to indicate that on arrival home he is to hold himself "on waiting orders" or in readiness for future assignment to duty. Counsel is informed that orders detaching officers and ordering them home invariably contained directions as to future duties when future duties are contemplated. As an illustration, take the following order, taken at random, embodied

in the opinion of this court in the case of United States *v.* Thomas, 195 U. S., 418:

> "SIR: You are hereby detached from duty in command of the U. S. T. S. *Lancaster,* will proceed immediately to Washington, D. C., and report at Navy Department, at that place, for special temporary duty. Hold yourself in readiness for orders to sea duty. This employment on shore duty is required by the public interest."

It is further to be observed that the claimant here is specifically ordered to inform the Department of the status of his accounts and whether he is indebted to the Government by reason of advances drawn by him, which, it is submitted, indicates that claimant's account with the Government was about to be settled, preparatory to the serverance of his employment as an officer of the Navy.

The Government's contention and that adopted by the Comptroller and the dissenting opinion of the Court of Claims is that this case is governed by this court's decision in the case of United States *v.* North (112 U. S., 510), and that the rule of that case decides this one against the claimant. The learned judge who delivered the dissenting opinion says at the outset thereof that he regretted his inability to concur in the opinion of the court in favor of the claimant, for the reason that it appeared to him inequitable not to do so, and he says further on that he had examined carefully the facts in the North case because it seemed to him harsh and apparently unjust to the claimant in this case that he should be detached from his ship when he was drawing pay at the rate of $1,700 per annum and ordered to his home to be discharged from the public service, and five days thereafter to be discharged and to be paid at the rate of only "waiting orders" pay—$1,000 a year, and that equity seemed to demand that he should have been paid at the rate of $1,700 per annum, because his entire enlistment and service was on "sea duty" And, again, further on, after concluding

that the rule in the North case compelled him to hold against the claimant's contention, he says:

> "If this were a matter of first impression the exceptional circumstances which the court thinks should bring this case within the spirit of the statute might prevail."

It is respectfully submitted that the learned justice who penned the dissenting opinion is in error in supposing that this court's decision in the North case compelled him, against his independant judgment, to the conclusion which he reached.

In the North case two questions arose:

First. Whether officers of the Navy and Regular Army who were employed in the prosecution of the war with Mexico were entitled to the three months' extra pay provided for by the acts of Congress of 1848 and 1879.

Second. If so, at what rate of pay they were entitled.

The first question was decided in the affirmative, and it is not involved here.

The following is the language of the act of 1848, so far as it bore on a solution of the second question:

> "That the officers, &c., engaged, &c., in the war with Mexico and who served out the time of their engagement, or may have been honorably discharged, shall be entitled to receive three months' extra pay."

North was a lieutenant in the Navy at the outset of the war with Mexico. He served in that war on board the frigate *Potomac,* as one of that vessel's complement of officers, until July, 1847, when the vessel sailed for the United States, and he was still an officer thereon.

In considering the question as to the rate of pay, this court said:

> "Those of the Regular Army or Navy who were 'engaged in the military service of the United States in the war with Mexico' may be said to 'have served out the term of their engagement,' or to have been 'honorably discharged,' *within the meaning of those terms as used in the act of 1848*, when the war was over, or when they were ordered or mustered out of that service."

This seems to indicate that this court, in construing the act of 1848, was impressed with the idea that Congress intended extra pay as if additional service in the war had been given in point of time, and that it attached little importance to the phraseology of the act as tending to limit that main intent. This idea is further enforced by the following language of the court:

> "The language (of the act) is, 'shall be entitled to receive three months' extra pay,' evidently meaning the *same pay they would have received if they had remained in the same service three months longer.*"

The language of the act of 1848 is, "shall be entitled to receive three months extra pay." The language of the act of 1899 is, "shall be paid two months extra pay." It is difficult to see how the language of the former act evidently means to give the officers as extra pay the same pay they would have received if they had remained in the same service three months longer, and that the language of the latter act means just the contrary.

In this connection attention is called to the fact that the act of 1848 used the term "honorably discharged," but that the act of 1899 omits the word "honorably." The latter act gives the pay even if the officer should be dishonorably discharged, provided he "served creditably" in the war with Spain. Actual and creditable service was made the basis for the extra pay and is the controlling idea in seeking to discover the intention of Congress as to the rate of extra pay. Moreover, if the rate is based on the idea that Congress in-

tended to give service pay, it affords a fixed measure for computing the pay. But if the Government's contention is correct, then Congress left it to the Department of the Navy to determine the rate at which all officers appointed under the act of 1898 still in office when the act of March 3, 1899, was passed, should be paid. The Department could have discharged one officer without ordering him home and another after ordering him home, and thus pay them at different rates.

It is somewhat curious that the Government is urging in support of its view for a narrow technical construction of the act of 1899 the ruling in the North case, which held against the narrow and technical construction of the act of 1848, as therein contended for by the Government. The spirit of the North decision was clearly in favor of a liberal construction of the act of 1848 in favor of the beneficiaries thereunder, which is all that is contended for here in support of the decision of the Court of Claims in its construction of the act of 1899.

EDWARD S. MCCALMONT,
Attorney for John M. Hite.

Supreme Court of the United States.

No. 276.—October Term, 1906.

The United States, Appellant, vs. John M. Hite. } Appeal from the Court of Claims.

[February 25, 1907.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was a petition for the recovery of $116.66. The case having been heard by the Court of Claims, that court, upon the evidence, filed the following findings of fact and conclusion of law:

"*Findings of Fact.*

"I. The claimant, John M. Hite, was appointed assistant engineer in the United States Navy, with the relative rank of ensign, for temporary service during the late war with Spain, on May 14, 1898; he reported for duty on board the U. S. S. 'Massachusetts,' in obedience to orders of the Navy Department, on June 1, 1898, and served creditably as such officer on said ship until December 17, 1898, at which date he was detached and ordered to his home, and on December 22, 1898, was honorably discharged from the naval service.

"The order referred to is in the words following:

'Navy Department,
Washington, D. C., Dec. 12, 1898.

'Sir: You are hereby detached from duty on board the U. S. S. 'Massachusetts,' and will proceed to your home.

'Immediately upon your arrival report your local address in full to the Bureau of Navigation, Navy Department, Washington, D. C. See article 224, U. S. Navy Regulations, 1896.

'Report also the date of your detachment, and inform the Department of the status of your accounts, and whether you are indebted to the Government by reason of advances drawn by you.

Respectfully.

John D. Long, *Secretary.*

Assistant Engineer John M. Hite, U. S. N.,
U. S. S. Massachusetts.'

"II. The U. S. S. 'Massachusetts' was in commission and cruised beyond the limits of the United States (in Cuban waters) during the time of the claimant's service on board.

"III. In settlement of claimant's claim for extra pay authorized by the act of March 3, 1899, he was allowed by the accounting officers of the

Treasury Department two months' pay at the rate of pay of an assistant engineer in the Navy on waiting orders only, to wit, $166.66.

"If entitled to two months' pay upon the basis of sea service the difference is $116.66.

Conclusion of Law.

"Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to judgment in the sum of one hundred and sixteen dollars and sixty-six cents ($116.66)."

The case is reported 41 Ct. Cl. 256.

The Act of March 3, 1899, (30 Stat. 1228, c. 427,) among other things, provides:

"The officers and enlisted men comprising the temporary force of the Navy during the war with Spain who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay."

Appellee's counsel say that the issue is correctly stated by counsel for the United States as follows:

"The claimant contends that the two months' extra pay provided for in the foregoing statute should be at the rate of pay he received while *doing sea service*, to wit, $1,700 per year.

"The contention of the Government is that under the ruling of this court in the cases of North and Emory (112 U. S. R. p. 510) the claimant has been paid all that was due him, inasmuch as he was paid two months' extra pay provided for in the statute at the rate of pay he was receiving *at the time of his discharge*, to wit, at the rate of $1,000 per annum."

Appellee was appointed an officer in the Navy, May 14, 1898, by authority of the act of Congress of May 4 of that year, (30 Stat. 369, c. 234,) which provided:

"Whenever, within the next twelve months, an exigency may exist which, in the judgment of the President, renders their services necessary, he is hereby authorized to appoint from civil life and commission such officers of the line and staff, not above the rank or relative rank of commander, and warrant officers including warrant machinists, and such officers of the Marine Corps not above the rank of captain, to be appointed from the non-commissioned officers of the corps and from civil life, as may be requisite: *Provided*, That such officers shall serve only during the continuance of the exigency under which their services are required in the existing war."

The war with Spain began April 21, 1898, and the treaty of Paris was signed December 10, 1898. Appellee served until December 17, 1898, at which time he was detached from the vessel on which he was serving and ordered home, where, on December 22, he was honorably discharged

from the naval service. It seems to have been thought reasonable that the Government should pay the expenses of the journey home and for the time in getting there.

The act of March 3, 1899, provided for extra pay for active service. Hite was detached because it became the Department's duty to discharge him under the proviso of the act of 1898, and the detachment was manifestly preliminary to his discharge. The order detaching him did not prescribe that on arrival home he was to hold himself "on waiting orders" or for further assignment to duty. On the other hand, it required him to inform the Department of the status of his accounts, obviously in order that they might be settled on his leaving the service.

The two months' extra pay is given, as Chief Justice Peele, delivering the opinion of the Court of Claims, says, "because of creditable service beyond the limits of the United States during the war with Spain, and therefore upon discharge such officers become entitled to the same pay they were receiving while so serving beyond the limits of the United States." "To hold, because the claimant was ordered to his home where he was discharged five days later instead of being discharged on the day he was detached, that therefore he is entitled only to the lesser pay would be a construction too narrow to harmonize with the purpose of Congress as disclosed by the act." Notwithstanding the considered dissenting opinion in the court below, we agree with the conclusion that his engagement having ended and he having been discharged, the two months' extra pay should have been given him upon the basis of the pay he was receiving when detached.

The contention of the Government is that this case is governed by the ruling in *United States* v. *North*, 112 U. S. 510. In that case it was held that officers of the Navy and of the regular Army, who were employed in the prosecution of the war with Mexico, were entitled to the three months' extra pay provided for by the act of Congress of July 19, 1848, c. 104, § 5, 9 Stat. 248, and the act of February 19, 1879, c. 90, 20 Stat. 316.

The act of 1848 provided: "That the officers, etc., engaged, etc., in the war with Mexico, and who served out the term of their engagement, or have been or may be honorably discharged, . . . shall be entitled to receive three months' extra pay."

North was an officer in the Navy of the United States from May 29, 1829, to January 14, 1861, when he resigned. He served in the war with Mexico, as lieutenant, on board the frigate Potomac, from February 10, 1846, until July, 1847, when his vessel sailed for the United States. And Chief Justice Waite said:

"Those of the regular Army or Navy who were 'engaged in the military service of the United States in the war with Mexico' may be said to 'have served out the term of their engagement,' or to have been 'honor-

ably discharged,' within the meaning of those terms as used in the act of 1848, when the war was over, or when they were ordered or mustered out of that service. Being in the Army and Navy, their 'engagement' was to serve wherever they were ordered for duty. Their engagement to serve in the war with Mexico ended when they were taken away from that service by proper authority.

"The pay they were to receive was evidently that which they were receiving at the end of their engagement, or when they were honorably discharged. The language is, 'shall be entitled to receive three months' extra pay,' evidently meaning the same pay they would have received if they had remained in the same service three months longer. It follows that, as North was serving at sea when he was ordered away, he was entitled to three months' sea pay, . . ."

In the present case, appellee was taken away from the service when he was detached from his vessel, as he was appointed to serve "only during the continuance of the exigency under which their services were required in the existing war," and was entitled, in the circumstances of the case, to extra pay on the basis of that which he was receiving when detached, as we have said above.

Emory's case was also considered by the court in the same opinion and the same conclusion reached, and reference was there made to that case as reported in 19 Ct. Cl. 254.

The judgment of the Court of Claims was right, and it is

Affirmed.

Mr. Justice MOODY took no part in the disposition of this case.

True copy.

Test:

Clerk Supreme Court, U. S.